JD(NY)–43-11
Springfield, MA

**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**DIVISION OF JUDGES**
**NEW YORK BRANCH OFFICE**

**VERIZON NEW ENGLAND, INC.**

**and**

**Case Nos. 1-CA-44539**
**1-CA-44556**
**1-CA-44612**

**INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2324, AFL-CIO**

*Laura Sacks, Esq.* and *Daniel Fein, Esq.*, Counsel for the General Counsel.
*Arthur Telegen, Esq.* and *John Duke, Esq., Seyfarth Shaw LLP,* Counsel for the Respondent.
*Alfred Gordon, Esq.*, Counsel for the Charging Party.

## DECISION

### Statement of the Case

**Joel P. Biblowitz, Administrative Law Judge:** The Consolidated Complaint herein, which issued on June 30, 2011, and was based upon unfair labor practice charges that were filed on March 27, April 9 and April 29, 2008[1] by International Brotherhood of Electrical Workers, Local 2324, AFL-CIO, herein called the Union, alleges that Verizon New England, Inc., herein called Respondent, violated Section 8(a)(1) of the Act, by telling employees in about March and April that they could not display signs containing such statements as "Verizon Honor Or Existing Contract," "Verizon We Are Ready Contract 08" and "Every Verizon Worker Should Be A Union Worker" in personal vehicles parked on company property. Among other defenses, the Respondent defends that this Complaint should be dismissed because the Board should defer to an arbitrator's decision which meets the standards set forth in *Olin Corp.* 268 NLRB 573 (1984) and is dispositive of the charges herein.

### I. Jurisdiction and Labor Organization Status

Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

### II. The Facts

The record herein is based solely upon stipulations and exhibits agreed to by the parties; there was no record testimony. The Respondent is engaged in the business of providing telecommunications services nationwide; however, only three of its facilities in Massachusetts are involved herein: the facilities in Westfield, Springfield and Hatfield, herein called the Westfield facility, the Springfield facility, and the Hatfield facility. Mark Brown was the manager of the Westfield facility, Tony Collier was the area operations manager of the Springfield facility, and David Walker was the area operations manager of the Hatfield facility, and each of them is admitted to be a supervisor and agent of the Respondent within the meaning of Section 2(11) and 2(13) of the Act.

[1] Unless indicated otherwise, all dates referred to herein relate to the year 2008.

Respondent was party to a collective bargaining agreement effective from August 3, 2003 to August 2, covering so called "plant" employees in Massachusetts and Rhode Island. This bargaining unit is represented by a number of local unions of the International Brotherhood of Electrical Workers, including the Union. The contract contains a grievance and arbitration provision as well as a No Strike provision, which states:

> The Union agrees that during the term of this Agreement, or any extension thereof, it will not cause or permit its members to cause, nor will any member of the Union take part in, any strike of or other interference with any of the Company's operations or picketing of any of the Company's premises…

In addition the contract provides that the Respondent shall furnish the Union with bulletin boards at its facilities, with the *caveat:*

> Bulletin boards are to be used by the Union for posting notices concerning official Union business, or other Union related matters, provided that if anything is posted on these bulletin boards that is considered by the Company to be controversial or derogatory to any individual or organization the Union agrees to remove such posted matter on demand and if it fails or refuses to do so, such matter may be removed by the Company.

The Union has engaged in ambulatory informational picketing at or near Respondent's facilities over the years. This informational picketing was most common when contracts were nearing expiration. Employees engaged in informational picketing would arrive at work before the start of their shifts and carry picket signs either on the sidewalk in front of Respondent's facilities, or in a nearby public area. In March 2008, in preparation for contract negotiations that were to take place in August 2008, without notice to Respondent, the Union began engaging in informational picketing at some of Respondent's facilities in Massachusetts. While there was no picketing at or near the Westfield, Springfield or Hatfield facilities in March 2008, the Union planned to engage in informational picketing at or near these facilities beginning in April 2008. Accordingly, in March 2008, the Union distributed informational picket signs to employees, which contained language to the effect of: "Verizon, Honor Our Existing Contract." These signs, measuring about twenty eight inches wide by twenty two inches high, are in black with white lettering.

Bargaining unit employees at the Springfield facility displayed these signs in the windshields of their personal vehicles parked on the Respondent's property during the first week of April 2008, and the signs were displayed in the cars every day that week. A line of about thirty cars with these signs was visible upon entering the parking lot and, depending on which way the cars were facing, some of these signs displayed in the cars were visible from the street. On about Friday, April 11, Collier instructed bargaining unit employees to remove these signs from their car windows while the cars were parked on its premises, and the employees complied with these instructions and no employee was disciplined as a result of displaying the signs. At the time that these signs were displayed at the Springfield facility, and at the time that Collier instructed the employees to remove the signs, no ambulatory informational picketing had occurred at the Springfield facility. Rather, the ambulatory informational picketing began in the street in front of the facility between 7:00 a.m. and 7:30 a.m. on Thursday, April 24, and continued at this facility at these same times on Thursday mornings thereafter for a period of time, using the signs that were placed in the car windows as discussed above.

Bargaining unit employees at the Westfield facility displayed these signs in the windshields of their personal vehicles parked on the Respondent's property on Thursday, March

20 and Friday, March 21. The signs displayed in the car windows were not visible from the public street, but were visible to Respondent's bargaining unit employees and managers, and were visible to employees of the Penske Trucking and Agway facilities that share the property with Respondent, and were visible to delivery drivers and others entering the property. On about Monday, March 24 or Tuesday, March 25, Brown instructed bargaining unit employees to remove these signs from their car windows while the cars were parked on its premises, and the employees complied with these instructions and no employee was disciplined as a result of displaying the signs. At the time that these signs were displayed at the Westfield facility, and at the time that Brown instructed the employees to remove the signs, no ambulatory informational picketing had occurred at the Westfield facility. Rather, the ambulatory informational picketing began in the street in front of the facility between 7:00 a.m. and 7:30 a.m. on Friday, April 25, and continued occasionally thereafter at this location at these same times.

Bargaining unit employees at the Hatfield facility displayed these signs in the windshields of their personal vehicles parked on the Respondent's property on Wednesday, April 23. The signs displayed in the car windows were not visible from the public street, because they were facing the wrong direction, but were visible to Respondent's bargaining unit employees, managers, and contractors, and to others entering the property, such as personnel of waste removal and landscaping contractors and personnel of the Postal Service, Federal Express and United Parcel Service. Later that day, Walker instructed bargaining unit employees to remove these signs from their car windows while the cars were parked on its premises, and the employees complied with these instructions at the time it was given, and no employee was disciplined as a result of displaying the signs. At the time that these signs were displayed at the Hatfield facility, and at the time that Walker instructed the employees to remove the signs, no ambulatory informational picketing had occurred at this facility. Rather, the ambulatory informational picketing began in a private parking lot approximately one half mile from the Hatfield facility between 7:00 a.m. and 7:30 a.m. on Thursday, April 24, and continued occasionally thereafter at this location at these same times.

The signs displayed in the bargaining unit employees' personal vehicles in March and April at the Springfield, Westfield, and Hatfield facilities as described above were not on sticks and when the bargaining unit employees engaged in the informational picketing at or near these facilities, as described above, they used the same signs again, without sticks. Respondent is not aware of any interruption or other disruption of its operations caused by the ambulatory picketing at these facilities.

On May 21 and June 18, Region 1 of the Board deferred these unfair labor practice charges to the grievance and arbitration procedures of the parties' collective bargaining agreement. Subsequently, the Union grieved the issue of whether the Respondent violated the contract by requiring the employees to remove the signs from their personal vehicles. An arbitration hearing was held on October 26, 2009 before Arbitrator Timothy Bornstein, one of a group of arbitrators regularly selected by the parties to resolve contractual disputes, and the Union presented six witnesses and Respondent presented one. Both sides were afforded the opportunity to examine and cross examine the witnesses and both submitted post hearing briefs.

The arbitrators' Award issued on January 20, 2010, with the Union's designated arbitrator dissenting. The award summarizes the testimony of the business managers of the Union, as well as another IBEW local union, three employees and Walker, and sets forth the contractual language of the following provisions: Bulletin Board, Arbitration, No Strike, and Management Rights, and the contentions of both sides. The Opinion concludes:

The core question here is whether management violated the parties' contract when it required removal of Union protest signs from employee vehicles parked on Company premises. That was the issue which the NLRB *Collyerized*. We conclude that several contract clauses reflect the parties' agreement that the Union- and its members- would not engage in picketing on Company premises during the life of the collective bargaining agreement.

Article G10, the No Strike article, provides that the "Union…will not cause or permit its members to cause, nor will any member of the Union take part in, any strike of or other interference with any of the Company's operations or picketing of any of the Company's premises." By any other name, Union members who place protest signs in their cars to inform the public of its contract concerns with Verizon are engaged in picketing. While the Union argues that placing signs in cars is not picketing because doing so only communicates a message, that is precisely what picketing is: to inform the public of the Union's concerns. Picketing does not have to be a sign on a stick.

The Union also contends that the Company decision to order the signs removed from cars was arbitrary or in bad faith in violation of Article G9.03(b), but there is no such evidence.

Whether the Company's demand that the signs be removed from employees' vehicles infringed employees' Section 7 rights is a question that we do not have the authority to resolve. Our authority is limited to interpreting the contract. We do no more.

By letter dated August 27, 2010, Region 1 of the Board notified the parties that it was refusing to issue a Complaint in the matter and was dismissing the Union's unfair labor practice charges, stating:

> By letter dated May 21, 2008, pursuant to the Board's decision in *Collyer Insulated Wire*, 192 NLRB 837 (1971), and pursuant to "Arbitration Deferral Policy under *Collyer*-Revised Guidelines" publicly issued by the General Counsel on May 10, 1973, I deferred a decision on the charges in the above-captioned cases pending the outcome of an arbitration proceeding.
>
> On January 20, 2010, the arbitrator selected by the parties issued an award ruling that the Employer acted within its rights when it required that the picket signs be removed from personal vehicles in the Company parking lots.
>
> I have made a careful review of this matter and find that the arbitration proceedings were fair and regular, that the parties had agreed to be bound by the results of the proceedings, that the unfair labor practice issue alleged and involved in the charges were presented to and considered by the arbitrator, that the contractual issue was factually parallel to the unfair labor practice issue, that the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice, and that the award is not in conflict with the purposes or policies of the National Labor Relations Act. Thus, the award meets the standards set forth by the Board in *Olin Corporation*, 268 NLRB 573 (1984), and the Board would defer to the award.
>
> Here, the unfair labor practice issue is whether the Employer violated employees' Section 7 rights by requiring employees to remove picket signs from their personal vehicles on the Employer's property. The issue presented to the Arbitrator was: Whether

management violated the parties' contract when it required removal of Union protest signs from employees' vehicles parked on Company property. Both the unfair labor practice and the grievance contemplate the same actions by the employees, putting the picket signs in the cars and the same action by the Employer, requiring the removal of the signs. Therefore, the issues are factually parallel.

In regard to your claim that the arbitrator's award was repugnant to the Act, the Board will not find an award is clearly repugnant unless it is shown to be palpably wrong, i.e., not susceptible to an interpretation consistent with the Act. The arbitrator's finding that the collective-bargaining agreement prohibited picketing on the Employer's premises and the union signs constituted picketing is susceptible to an interpretation with the Act and, therefore is not repugnant.

I am, therefore, refusing to issue a Complaint in this matter, and the charges are hereby dismissed.

Subsequently, Region 1 conducted a further investigation, determined that deferral to the arbitrator's award was not appropriate, but dismissed the charges on the merits stating, by letter dated February 14, 2011:

> The Region has carefully investigated and considered the charges against Verizon, Inc., alleging violations under Section 8 of the National Labor Relations Act.
>
> The charges allege that the Company interfered with employees' rights to engage in protected concerted activities under Section 7 of the Act, by ordering employees who displayed union signs in their cars, while the cars were parked on Company property, to remove them.
>
> The case was originally *Collyer* deferred on May 21, 2008, and the Office of Appeals denied the Union's appeal of the deferral determination on June 28, 2008.
>
> On January 20, 2010, an Arbitrator's Award issued in favor of the Employer, stating that the Employer acted within its rights when it required that the picket signs be removed from personal vehicles in the Company parking lots.
>
> On May 14, 2010, the Union submitted a position statement requesting that the Region not defer to the Arbitrator's Award and, instead, process the case further. The Union argued that the Region should not defer to the Arbitrator's Award because: (1) The arbitrator did not consider the unfair labor practice issue; and (2) the award was repugnant o the Act.
>
> On August 27, 2010, the Region deferred to the Arbitrator's award and dismissed the unfair labor practice charges, basing its decision upon its *Spielberg/Olin* review of the arbitration award. The Region determined that the proceedings were: fair and regular; the parties had agreed to be bound by the results of the proceeding; the unfair labor practice issue alleged in the charges were presented to, and considered by the arbitrator; the contractual issue was factually parallel to the unfair labor practice issue; the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice; and the award was not in conflict with the purposes or policies of the Act. *Olin Corporation,* 268 NLRB 573 (1984). Accordingly, the Region deferred to the award and dismissed the charge.

On September 5, 2010, the Union appealed the Region's dismissal. Prior to a finding by the Office of Appeals, the Region conducted further investigation. Based upon that investigation, I find that deferral to the Arbitrator's Award is not appropriate because his conclusion that the Union's conduct of seeking to communicate a message by displaying signs in parked vehicles constituted picketing was overly broad and, therefore, repugnant to the Act. I am, therefore, revoking my August 27, 2010 dismissal letter. I further find, however, that further proceedings on your charges are not warranted based on additional evidence obtained in the further investigation.

**Decision to Dismiss:** Based on additional investigation, I have concluded that further proceedings are not warranted, and I am dismissing your charge for the following reasons:

After further investigation, the Region found that the Union's informational picketing against the Employer was an area-wide effort that began two weeks prior to the Employer's prohibition against sign posting in employee vehicles on the Employer's property. Further, the directive to remove the signs at the locations at issue in your charges began one day prior to traditional picketing at two of the three locations at issue and within a couple of weeks at the third location. I note that the Union made and distributed the picket signs for the purpose of engaging in informational picketing, conduct the Union had a practice of engaging in prior to the expiration of prior contracts. Accordingly, it is reasonable to conclude that the conduct engaged in here was part and parcel of an area-wide picketing campaign in furtherance of a labor dispute rather than the mere placement of signs in employee vehicles on Company property. This finding is consistent with the Board's recent case on bannering. In *United Brother of Carpenters and Joiners of America (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (August 27, 2010), the Board acknowledged that there are prior Board decisions finding picketing during periods when there was no patrolling or other ambulation, and found those cases distinguishable because the display of stationary signs or distribution of handbills in those cases was preceded at the same location or accompanied at other locations by traditional ambulatory picketing and, in many instances, the same signs were displayed that had been utilized in traditional picketing. Accordingly, the Employer, relying on that portion of the collective-bargaining agreement in which the Union clearly and unequivocally waived the employees' right to picket on the Employer's premises, lawfully directed employees to remove signs from vehicles parked on the Employer's premises. I note that the Employer's directive was narrowly tailored to restrict picketing on the Employer's property in accordance with the parties' collective-bargaining agreement.

The Union appealed this dismissal on about March 6, 2011, and on June 2, 2011, the Office of Appeals sustained the Union's appeal, and remanded the case to the Region with instructions to issue a complaint, absent settlement, stating only: "The Employer's prohibition on employees from displaying union signs in their vehicles located in the employees' parking lot raised issues warranting Board determination based on record testimony developed at a hearing before an administrative law judge."

## III. Analysis

The initial question herein is whether the arbitrators' decision satisfies the requirements of *Olin, supra*, which modified the Board's deferral standards somewhat. In *Olin,* the administrative law judge, finding that the arbitrator had not properly or seriously considered the unfair labor practice, declined to defer to the arbitrator's decision, but dismissed the Complaint on the merits. The Board reversed, finding that the judge should have deferred to the arbitrator's

decision under the standards set forth in *Spielberg Manufacturing Co.*, 112 NLRB 1080 (1955), while also setting forth more specific standards for arbitration deferral, specifically rejecting the proposition that "…arbitration awards are appropriate for deferral only when the Board determines on de novo consideration that the award disposes of the issue just as the Board would have." Rather, the Board adopted the following standard for deferral:

> We would find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is "clearly repugnant" to the Act. And, with regard to the inquiry into the "clearly repugnant" standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is "palpably wrong," i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

In addition, the Board placed upon the party seeking to have the Board ignore the arbitrator's decision, "the burden of affirmatively demonstrating the defects in the arbitral process or award." Therefore, the issues herein are whether the contractual issues as presented to the arbitrator were factually parallel to the unfair labor practice issues and whether the parties to the arbitration litigated the facts relevant to the unfair labor practice issue, as well as the contractual issue, and whether the arbitration decision was repugnant to the Act or was palpably wrong, remembering that it is the burden of Counsel for the General Counsel and counsel for the Charging Party to establish that the Board should not defer to the arbitration award

In *Andersen Sand and Gravel Company*, 277 NLRB 1204 (1985), the administrative law judge, in finding that deferral was inappropriate, relied on the absence of any rationale in the arbitration award indicating that the panel considered the unfair labor practice allegation. The Board reversed, finding that deferral was appropriate as the Counsel for the General Counsel did not sustain her burden:

> First, it is clear that that the contractual and statutory issues are factually parallel. Indeed, as admitted by the General Counsel, the question of whether an employee may be discharged for violating a no strike clause is one which must be decided on a determination of the meaning and interpretation of the collective-bargaining agreement. Thus, the statutory question of whether the right to strike for less than 24 hours is protected under a 24 hour clause, or has been clearly and unequivocally waived under the no-strike provision of the contract, is a question of contract interpretation.

The Board found that the contractual and statutory issues were coextensive and that the arbitration panel was presented generally with the facts relevant to resolving the unfair labor practice. The Board stated further:

> Although the judge premised his decision in part on a finding that the arbitration panel did not receive or consider the law relating to the unfair labor practice, we believe the judge misinterprets the requirements of *Olin*. Under *Olin*, the arbitrator need only be "generally presented" with the facts relevant to resolving the statutory issue.

The Board concluded:

> In the absence of any evidence to the contrary, it is reasonable to conclude that

> resolution by the panel of the contractual issue required the same evidence relevant to resolving the unfair labor practice issue. Therefore, because the evidence before the arbitration panel was essentially the same evidence necessary for a determination of the merits of the unfair labor practice charge, we are satisfied that this requirement has been met.

Finally, in response to Counsel for the General Counsel's argument that the award was repugnant to the purposes and policies of the Act, the Board, at footnote 6, states: "Deferral recognizes that the parties have accepted the possibility that an arbitrator might decide a particular set of facts differently than would the Board. This possibility, however, is one which the parties have voluntarily assumed through collective bargaining."

In *Specialized Distribution Management, Inc.*, 318 NLRB 158 (1995), four employees left their work stations without permission, in apparent violation of a number of contractual provisions. When they were called into the manager's office, were told that they were being suspended pending further investigation and were told to punch out and leave the facility, they refused to leave without a letter of explanation. Three eventually left after the security department was called, and the fourth did not leave until the sheriff's department was called. The arbitrator found that walking off the job was not a dischargeable offense, but that the insubordination charge warranted substantial disciplinary action. He converted the discharges of the three who left the facility into suspensions without backpay and found that the discharge of the fourth employee was for just cause. Counsel for the General Counsel argued against deferral, alleging that the unfair labor practice issue was not considered, and that the decision was repugnant to the Act. The judge, as affirmed by the Board deferred. Citing footnote 6 of the Board decision in *Andersen, supra*, the judge stated:

> Arbitrator Kagel has found facts that generally track those alleged to be unfair labor practices and the General Counsel has not established that the arbitrator was lacking any evidence relevant to the determination of that issue. Moreover, Kagel found that the insubordination overrode the other considerations, including what might be a protected circumstance.

In *Laborers International Union, Local 294,* 331 NLRB 259 (2000), the Complaint alleged that the Respondent Union violated Section 8(b)(1)(A) & (2) of the Act by dispatching three individuals to jobsites, in violation of its contract and hiring hall rules, thereby bypassing other employee-registrants who were entitled to be dispatched. The relevant contractual provision relating to hiring hall dispatching generally provides that referrals are in the order of registration on the out-of-work list, with certain exceptions whereby an employer may request that a specific individual be referred. The judge refused to defer to an arbitrator's decision; the Board reversed, finding that the contractual issue before the arbitrator was factually parallel to the unfair labor practice issue:

> The critical point of both the contractual grievance and the unfair labor practice was that the Respondent Union violated the hiring hall rules in making specific dispatches to Valley Fence and Fresno Paving. Thus, the arbitrator considered substantially the same issue as that raised by the General Counsel's complaint. The arbitrator also had before him and reviewed the same facts that would be relevant to the unfair labor practice.

In *Smurfit-Stone Container Corp.*, 344 NLRB 658, 659-660 (2005), the Board, in deciding to defer to the arbitrator's decision, further defined "susceptible to an interpretation consistent with the Act" as stated in *Olin, supra*:

> "Susceptible to an interpretation consistent with the Act" means precisely what it says. Even if there is one interpretation that would be inconsistent with the Act, the arbitral opinion passes muster if there is another interpretation that would be consistent with the Act. Further, "consistent with the Act" does not mean that the Board would necessarily reach the same result. It means only that the arbitral result is within the broad parameters of the Act. Thus, the Board's mere disagreement with the arbitrator's conclusion would be an insufficient basis for the Board to decline to defer to the arbitrator's award.

In *Kvaerner Philadelphia Shipyard, Inc.*, 347 NLRB 390 (2006), the Board affirmed the judge's dismissal of a Section 8(a)(3) allegation and deferred to an arbitrator's decision upholding the discharge. The employee wrote a letter to fellow employees containing false allegations that the employer had withheld some of their pay and benefits and had earned interest for itself with the withheld money. The employee and the union contended that he was engaged in protected concerted activities, but the arbitrator distinguished his conduct from protected conduct: "However, by publishing unjustified allegations of intentional bad faith to other employees without attempting to ascertain the facts, the grievant rendered himself vulnerable to the imposition of substantial discipline. There is no merit to the Union's assertion that the grievant was engaged in protected speech or concerted action. His action recklessly publishing accusations of dishonesty for other employees to take or see is not protected speech under these circumstances…" The Board, quoting from *Smurfit, supra,* found that the arbitrator adequately addressed the unfair labor practice allegation in finding that the grievant lost the protection of the Act and that his result was not repugnant to, or inconsistent with Board precedent: "The arbitrator's factual finding here, that Smith had acted with reckless disregard for the truth, is not palpably wrong, and is susceptible to an interpretation consistent with Board precedent. We therefore find that deferral is appropriate."

On the other hand, there are cases that go the other way, finding that the arbitrator's decision is repugnant to the purposes and policies of the Act. In *Garland Coal & Mining Co.*, 276 NLRB 963 (1985), the Board refused to defer to an arbitrator's decision upholding the discharge of a union president who was fired for refusing to obey a supervisor's order to sign a memo setting forth the employer's position on an issue relevant to the union. The arbitrator found his refusal to be insubordination. The Board agreed with the judge that the discriminatee "…was espousing a view and engaging in activity in support of the union's interpretation of the collective bargaining agreement. To find that Oldham was insubordinate under these circumstances is not susceptible to any interpretation consistent with the Act. " Similarly, in *110 Greenwich Street Corp.*, 319 NLRB 331 (1995), the Board refused to defer to an arbitrator's award upholding the discharge of an employee for engaging in concerted activities. The employee was fired for posting signs in his car windows while the car was parked in front of the building where they were employed. The signs objected to the fact that the employer was regularly late in paying the employees and that the employer should sell his expensive car and pay the employees in a timely manner. The arbitrator ruled that the "display of controversial placards in front of the building" justified the discharge of the employee. The judge, as affirmed by the Board, found that "…the arbitrator's finding that the display of controversial placards is a just basis for disciplinary action is similarly misguided; the award is not susceptible to an interpretation that is consistent with the employees' rights to engage in concerted activities under Section 7 of the Act" and was therefore repugnant to the Act.

In *Mobil Oil Exploration & Producing, U.S., Inc.*, 325 NLRB 176 (1997), the discriminatee/Charging Party had an ongoing dispute with the union president, alleging that he was working at another job while allegedly conducting union business, and he reported the situation to his (and their) employer. The employer told him that he would investigate the

allegations, but that it was confidential, and that he was not to discuss it with anyone. Shortly thereafter, he was overheard discussing the investigation with fellow employees and he was fired for improper interference with the investigation and for insubordination. The arbitrator upheld the discharge finding that the Charging Party was insubordinate by not complying with the instructions that he received to keep the investigation confidential. The Board refused to defer to the arbitrator's award:

> We agree with the General Counsel that the arbitration award is palpably wrong and repugnant to the Act because the precipitating event that caused Pemberton's termination was his exercise of protected concerted activities. Because the arbitration award upholds Pemberton's discipline based on his protected concerted activities, we find that deferral to the award is inappropriate and that the Respondent violated Section 8(a)(1) as alleged.

The initial requirements of *Spielberg* and *Olin* have clearly been met as the proceedings appear to have been fair and regular and all parties agreed to be bound by the arbitrator's decision. I also find that the arbitrator was presented with the facts relevant to resolving the unfair labor practice issue and adequately considered the unfair labor practice issue, which was factually parallel to the contractual issue. The panel discussed all the relevant contractual terms, interpreted them and determined (right or wrong) that the signs in the car windows violated these contractual provisions and that the Respondent's directives to the employees to remove the signs did not violate the contract. The decision concluded by saying that the arbitration panel did not have the authority to resolve the issue of whether the management directive infringed on employees' Section 7 rights, and the panel was correct. That is a Board function to resolve and, if appropriate, to correct.

The final issue in determining whether to defer to the arbitration ruling is whether Counsels for the General Counsel and the Charging Party have sustained their burden that the arbitrator's decision is repugnant to the Act, or palpably wrong. I find that they have not. Counsel for the General Counsel, in his brief, forcefully argues that the Respondent's direction to the employees to remove the signs from their vehicles was unlawful because the no-picketing provision contained in the contract did not "clearly and unmistakably" waive the Union's statutory right to engage in lawful informational picketing. Citing a recent case, *Carpenters Local 1506 (Eliason & Knuth of Arizona, Inc.)*, 355 NLRB No. 159 (2010), Counsel for the General Counsel also argues that the signs in the employees' vehicles did not constitute picketing and, further, for a stationary sign to qualify as picketing there must be an element of confrontation. Although these arguments may be correct, that is not helpful in sustaining his burden herein. More to the point is the argument made by counsel for the Respondent: "There is nothing in Board law that prevents an arbitrator from interpreting the word 'picket' in a collective bargaining agreement provision prohibiting picketing more broadly than the Board would in an unfair labor practice case not involving such a provision. This is especially so given the vacillations in Board precedent over the definition of 'picketing' under the Act." In *Bell-Atlantic-Pennsylvania, Inc.*, 339 NLRB 1084, 1087 (2003), the employer prohibited its employees with customer contact from wearing "Road Kill" shirts which it felt reflected negatively on its image and employees who failed to comply with this directive were suspended for one day without pay. The arbitrator sustained the punishment, finding that the employer reasonably could believe that observing the employees wearing the shirt would unsettle the public. In deferring to the arbitrator's decision, the Board stated that they could not say that the arbitrator was "palpably wrong" in striking the balance of interest as he did:

> In short, we find that although the Road Kill shirt was protected under Section 7, it was not repugnant or "palpably wrong" for the arbitrator to find that employees' Section 7

interests may give way to the Respondent's legitimate interests in protecting its public image under the circumstances of this case.

I therefore find that although the Board, upon hearing this case *de novo* might have reached a different conclusion than that reached by the arbitrator, finding that the signs in the vehicle windows was not picketing and were protected, the arbitrator's decision was neither repugnant to the Act nor was it palpably wrong. I would therefore defer to the arbitrator's decision, and recommend that the Complaint be dismissed.

**Conclusions of Law**

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The arbitrator's decision should be deferred to, and therefore the Respondent did not violate Section 8(a)(1) of the Act as alleged in the Complaint.

On these findings of fact, conclusions of law and based on the entire record, I hereby issue the following recommended[2]

**ORDER**

It is recommended that the Consolidated Complaint be dismissed in its entirety.

**Dated, Washington, D.C. November 15, 2011**

**Joel P. Biblowitz**
**Administrative Law Judge**

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.